[2014] JMCA App 30

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 29/2014

APPLICATION NO 133/2014

BETWEEN	**CONTINENTAL BAKING CO LTD**	**APPLICANT**
AND	**SUPER PLUS FOOD STORES LTD**	**1ST RESPONDENT**
AND	**TIKAL LTD**	**2ND RESPONDENT**

Mrs M Georgia Gibson-Henlin instructed by Henlin Gibson Henlin for the applicant

Nigel Jones and Miss Kashina Moore instructed by Nigel Jones and Co for the respondents

16 and 17 September 2014

IN CHAMBERS

ORAL JUDGMENT

BROOKS JA

[1] Super Plus Food Stores Limited and Tikal Limited (together referred to herein as "the appellants") are companies in financial trouble. They are suffering from massive debts owed to a number of creditors. Among their creditors is the applicant, Continental Baking Company Limited (Continental Baking). On 24 May 2013, E Brown J handed down a judgment against the appellants in favour of Continental Baking. The

judgment, in the sums of $139,951,452.00, $16,774,552.00 and $33,093,241.00, was based on admissions made by the appellants.

[2] In their appeal against the judgment, the appellants have complained that the sums awarded are in excess of the amount that Continental Baking had claimed against them. It is the appellants, however, that had admitted in their defence, to owing those sums to Continental Baking. This is although the claim had stipulated that $139,951,452.00 was owed to Continental Baking, $16,953,744.00 was owed to Rainforest Seafood Ltd (Rainforest) and $41,153,680.00 was owed to Copper Wood Limited (Copper Wood), all creditors of the appellants. These creditors are hereafter collectively referred to as the claimants. The claimants' separate claims were included in a single action against the appellants.

[3] The explanation for the curiously rolled-up claim seems to lie in the fact that there were prior negotiations between the claimants and the appellants in which the sum due to each claimant was agreed and a method of settlement was proposed. They failed to agree on the method of ensuring the payment and, in the absence of payment, the claimants filed their claim in the Supreme Court.

[4] Continental Baking views the appeal as denying it a judgment to which it is entitled and is alarmed that the appeal, by virtue of the costs which will be incurred, will only increase the sums due to it, which sums the appellants may be unable to pay. It has therefore applied for this court to order that the appellants give security for the costs of the appeal.

[5] The appellants have resisted that application stating that even though they have financial difficulties there are a number of reasons for refusing the application, not least of them being that the appeal stands a good chance of success. Continental Baking has filed a counter-notice of appeal contending that this court has the jurisdiction to order the pleadings amended so as to accord with the judgment. It is confident, therefore, that the appeal and counter-notice of appeal will be resolved in its favour and that it should not be further out of pocket.

[6] The question for this court is whether an order for security for costs should be made, bearing in mind the appellants' financial woes on the one hand, and a strong ground of appeal on the other. The general law with regard to applications for security for costs will first be examined before applying the relevant principles to the circumstances of this application.

The principles governing an application for security for costs

[7] Rule 2.11(1)(a) of the Court of Appeal Rules (CAR) authorises a single judge of this court to make orders for the giving of security for the costs occasioned by an appeal. The grant of security for costs lies in the discretion of the judge. Rule 2.12(3) of the CAR, although intended as guidance to the court as to the exercise of that discretion, also assists a single judge of the court in the consideration of such applications. It states:

> "(3) In deciding whether to order a party to give security for the costs of the appeal, the court must consider –
>
> (a) **the likely ability of that party to pay the costs of the appeal if ordered to do so**; and

(b) whether in all the circumstances it is just to make the order." (Emphasis supplied)

[8] Guidance may also be found in the unreported decisions of this court in the cases of **Speedways Jamaica Ltd v Shell Company (WI) Ltd and Another** SCCA No 66/2001 (delivered 20 December 2004), **Cablemax Limited and Others v Logic One Limited** SCCA No 91/2009 (Application No 203/2009 – delivered 21 January 2010), **The Shell Company (WI) Ltd v Fun Snax Ltd and Another** [2011] JMCA App 6 and **Disciplinary Committee of the General Legal Counsel v Oswald James** [2014] JMCA App 3.

[9] The fact that an appellant is impecunious is important. It has serious implications for the respondent to the appeal. Section 388 of the Companies Act authorises the court to require an impecunious company to provide security for costs. The section states:

> "388. Where a limited company is plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter, may if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given."

The provision would also apply to an appellant.

[10] In **Speedways Jamaica Ltd v Shell Company (WI) Ltd and Another**, P Harrison JA (as he then was) stated the approach of the appellate court in applications for security for costs where the appellant is said to be impecunious. He said at page 6 of the judgment of the court.

> "As a general rule an appellate court will grant an order for security for [sic] costs of an appeal in circumstances where an appellant is impecunious and it seems likely that if he fails in his appeal the respondent would experience considerable delay and would be put to unnecessary expense to recover his costs of the appeal. The court will exercise its discretion depending on all the circumstances of the case."

Harrison JA also pointed out that it is necessary for the applicant for security for costs to clearly show that the appellant is impecunious.

[11] The issues in relation to a company's ability to meet an order for the payment of the costs of an appeal were specifically considered in **Cablemax Limited**, where Morrison JA set out certain principles that assist in this analysis. He said at paragraph [14] of his judgment:

> "[14] In **Keary Developments Ltd and Tarmac Construction Ltd and another** [1995] 3 ALL ER 534, the principles governing the exercise of the jurisdiction to order security for costs against a plaintiff company under the equivalent provision of the UK Companies Act 1985 were reviewed and restated by Peter Gibson LJ (at pages 539 – 542). These principles, which are in my view equally applicable to an application made under rule 2.12 of the CAR, may be summarised as follows:
>
> (i) The court has a complete discretion whether to order security and accordingly it will act in the light of all the relevant circumstances.
>
> (ii) The possibility or probability that the party from whom security for costs is sought will be deterred from pursuing its appeal by an order for security is not without more a sufficient reason for not ordering security.
>
> (iii) In considering an application for security for costs, the court must carry out a balancing exercise. That is, it must weigh the possibility of injustice to the appellant if

prevented from pursuing a proper appeal by an order for security against the possibility of injustice to the respondent if no security is ordered and the appeal ultimately fails and the respondent finds himself unable to recover from the appellant the costs which have been incurred by him in resisting the appeal.

(iv) In considering all the circumstances, the court will have regard to the appellant's chances of success, though it is not required to go into the merits in detail unless it can be clearly demonstrated that there is a high degree of probability of success or failure.

(v) Before the court refuses to order security on the ground that it would unduly stifle a valid appeal, it must be satisfied that, in all the circumstances, it is probable that the appeal would be stifled.

(vi) In considering the amount of security that might be ordered the court will bear in mind that it can order any amount up to the full amount claimed, but it is not bound to order a substantial amount, provided that it should not be a simply nominal amount.

(vii) The lateness of the application for security is a factor to be taken into account, but what weight is to be given to this factor will depend upon all the circumstances of the case."

I respectfully adopt those principles as being applicable to this case.

[12] The timing of an application for security for costs is referred to by Morrison JA in the quotation above. Where an application has been filed very late, it may be viewed as reflecting insincerity on the part of the applicant. In addition, it may also work injustice. In **A Co v K Ltd** [1987] 3 All ER 377, Sir John Donaldson MR pointed out that a late application may result in prejudice to the appellant. He said, in part, at page 377:

"...there must be prejudice. An appellant has to decide whether he is going to appeal. At that stage he is entitled to

> know whether an application is going to be made requiring him not only to pay his own costs of the appeal but to give security for the other side's costs. An appellant is entitled to know what his position is. [If, after he has already gone to the expense of preparing his appeal, he] is suddenly told, 'Abandon all this or put up security for costs,' an entirely uncovenanted and probably unexpected piece of expenditure ... that is very real prejudice and, indeed, potential injustice."

[13] It is important, therefore, to balance the need to protect a respondent to an appeal, from being prejudiced, against the need to ensure that a deserving appeal is not stifled as a result of the inability of the appellant to provide security for costs. That is the point made by Morrison JA in point (iii) in the quotation from **Cablemax Limited**. Indeed, the prospects of success of the appeal should be the first issue to be considered. It should be borne in mind, however, that the hearing of the application is not the hearing of the appeal. As Morison JA pointed out, it is not required to go into the merits of the appeal in detail.

The analysis

[14] Based on those principles, the first issue to be considered is whether the appeal in the instant case has a real prospect of success. In this regard Mr Jones, on behalf of the appellants, stressed the principle that a judgment may not be entered for more than the sum claimed. He cited, in support of that principle the dictum of Harris JA in **Lyndel Laing and Another v Lucille Rodney and Another** [2013] JMCA Civ 27. The learned judge said, in part, at paragraph [25]:

> "...As a matter of law, a claimant cannot recover by a judgment, more than that which has been pleaded - see [**Chattell**] **v Daily Mail** (1901) 18 TLR 165 CA. **It follows therefore, that even if as submitted by** [**counsel for**

> **the judgment creditor**], **there was a consent for an amount in excess of that which was claimed, judgment for an increased amount ought not to have been entered unless the pleadings were amended to reflect the increase** and the parties had consented to an amendment of the claim form prior to signing judgment." (Emphasis supplied)

[15] There is, however, the question of the counter-notice of appeal. Although the counter-notice requested that this court should uphold the judgment, but order the pleadings to be adjusted to accord with it, Mrs Gibson-Henlin argued on behalf of Continental Baking that this court could, alternatively, correct the judgment in order to reflect the sum that Continental Baking had claimed. She submitted that, as there is no issue that the appellants owe the sum of $139,951,452.00 to Continental Baking, this court would vary the judgment on admission so that it reflects this sum only.

[16] Learned counsel argued that the appeal was not the correct course for the appellants to have adopted. She submitted that this was not a judgment on the merits of the case and therefore it was within the jurisdiction of the Supreme Court to have varied or set it aside. The appellants, she submitted, ought properly to have pursued one of two courses in the court below. They should have either, before the judgment was perfected, have applied to withdraw their admissions (rule 14.1(6) of the Civil Procedure Rules (CPR)), or, after the judgment had been perfected, applied for a variation of the judgment, by virtue of rule 14.13 of the CPR. Either course, she argued, would have been more cost efficient than the pursuit of an appeal.

[17] As an aside, it should perhaps be noted that, the parties each had different legal representation in the court below.

[18] In support of her submissions, Mrs Gibson-Henlin cited, among others, **Leymon Strachan v The Gleaner Company** PCA No 22 of 2004 (delivered 25 July 2005) and **White (for and on behalf of the members of Equity Red Star Syndicate No 0218 at Lloyds) v Greensand Homes Ltd and Another** [2007] EWCA Civ 643. **Strachan** deals with the issue of the jurisdiction and **White** deals with the withdrawal of admissions.

[19] On learned counsel's submissions, the result of the appeal would be in favour of Continental Baking in the sum of $139,951,452.00, and it would be entitled to the costs of the appeal or at least of the counter-notice of appeal.

[20] **Laing v Rodney** supports the appellants' stance that their appeal has a real prospect of success. If the principle that they seek to extract from that case is correct, it is at least arguable that the judgment of Brown J should not stand.

[21] Without deciding the point of whether the appellants should have first proceeded in the court below, it will be sufficient to observe at this stage that it does not seem that the CPR excludes the pursuit of an appeal where a judgment is apparently defective. If an appeal is not precluded by the CPR, it would seem that this appeal may properly be adjudicated upon by this court. Whether or not the counter appeal is successful cannot negative the need to correct a judgment that has been entered in error.

[22] The second major issue that the appellants raise is that of the timing of Continental Baking's application. The appellants complain that the application was filed

after the date for the hearing of the appeal had been set and the parties had been advised of that date. Mr Jones, in his written submissions, pointed out that due to the late filing by Continental Baking, the hearing of the application has been set for just a week prior to the scheduled consideration of the appeal.

[23] Learned counsel submitted that the lateness of the application is "highly prejudicial". He argued that the context of the rules of this court dealing with procedural appeals such as the present appeal, required swift action. He pointed out that an appellant is required to file its submissions along with its notice of appeal, while the respondent to the appeal is required to file its response within seven days. Continental Baking, he submitted, did not act swiftly. He relied on the decision of **A Co v K Ltd** in support of his submissions.

[24] In response, Mrs Gibson-Henlin argued that the timing was as a result of the state of the practice following from the decision in **Clarke v The Bank of Nova Scotia Jamaica Ltd** [2013] JMCA App 9, in which this court ruled that a single judge of this court may not hear procedural appeals, but that they had to be heard by the court itself. She submitted that, as far as she was aware, the practice of this court since that decision has been that procedural appeals are heard in open court and not on paper. That practice, she argued, not only affected the issue of timing of compliance with the rule dealing with procedural appeals, but also affected the issue of the quantum of costs. In other words, the time restrictions of the rule were in abeyance since an appeal heard in open court would take longer to be placed on the cause list.

In addition, an appeal would incur greater costs than if it were heard by the court on paper.

[25] Learned counsel submitted that the application for security for costs was delayed by the process of correspondence seeking the security prior to the filing of the application.

[26] There is much merit in Mr Jones' submissions on this point. The appellants received permission to appeal on 10 April 2014. The appeal was filed on 22 April 2014 and the counter-notice of appeal was filed on 5 May 2014. Although it was represented at the hearing when permission to appeal was granted, Continental Baking did not file its present application until 30 July 2014, which was the same day that it received the notice that the appeal would have been heard on paper during the week of 22 September 2014. It appears from the correspondence, however, that the application had been filed on 29 July, but, by mistake, in the Supreme Court, rather than in this court.

[27] This was indeed, as is implicit in Mrs Gibson-Henlin's submissions regarding the jurisdiction of the court below, very much a procedural appeal. The appellants have proceeded in accordance with the rules governing procedural appeals. Continental Baking did not, however, proceed in that manner. It did not file any submissions in response to the appellants' submissions that were filed with the notice of appeal.

[28] Unfortunately, the parties were notified of the hearing just before the beginning of the long vacation. Continental Baking's application, having been filed at that time,

did not come on for hearing before today. The result of the late application for security for costs is prejudicial to the appellants.

[29] Against those matters, however, must be balanced the principle that an appellant, who has been proved to be impecunious, should not normally be allowed to prosecute an appeal without having given security for costs. Mrs Gibson-Henlin stressed in her submissions that it was patent that the appellants are impecunious.

[30] The affidavits filed in the court below do speak volumes as to the appellants' financial woes. Continental Baking has demonstrated through that evidence that the appellants are impecunious. In one of those affidavits (filed on 7 April 2014), on behalf of the appellants, Ms Kashina Moore deposed at paragraph 4:

> "That I have been advised further by Mr [Wayne] Chen [one of the directors of both appellants] and verily believe that the Defendants being related companies involved in a supermarket chain no longer operate the several supermarkets they did in the past. I have been further advised that the Defendants' indebtedness to various third parties is so great that there are several outstanding and new demands from its [sic] creditors that they are unable to satisfy...."

[31] Despite the obvious impecuniosity, the order for security for costs is not mandatory. This court still has the discretion to refuse an application for such an order in an appropriate case.

[32] In conducting the balancing exercise, the prospects of the appeal, the timing of the application and the appeal being a procedural appeal, when considered, outweigh the impecuniosity principle in this case. The hearing of the appeal being imminent, the

appellants have already put all in place for it to be heard. Their record of appeal was filed on 5 August 2014. They were already well on the road to having their appeal heard when the present application was filed.

[33] The timing of the appeal is therefore an important first factor militating against an order for security for costs. Such an order would undoubtedly result in a postponement of the scheduled consideration of the appeal. A reasonable time for compliance with such an order would extend beyond the scheduled hearing of the appeal during the week of 22 September 2014.

[34] The second important factor is that the bulk of the costs have already been incurred. The parties are not likely to incur much more by way of costs, as the appeal will be considered on paper and counsel need not be briefed for the consideration. It is true that Continental Baking did not file its submissions as it ought, but its default should not be visited on the appellants. Out of an abundance of caution, an order should be made extending the time within which it may file its submissions.

[35] The third factor is the need to correct a judgment which, on its face, is at least inaccurate. Despite the fact that the judgment resulted from an admission by the appellants that they owed the three sums to Continental Baking, the fact remains that the sum that Continental Baking claimed as being due to it is less than the total of those three sums.

[36] Those factors, it is found, require the court to say that it would not be just to make the order sought. The application should, therefore, be refused.

[37] The issue of the costs of the application should abide the conclusion of the appeal.

Conclusion

[38] Although the evidence is that the appellants are impecunious, there are circumstances that would render an order for security for costs, at this time, unjust. They are, firstly, that the appellants have a strong ground of appeal, secondly, that the application has been filed so late that the bulk of the costs have already been incurred and finally that such an order would necessarily result in the postponement of the consideration of the appeal, which has been scheduled for next week.

Order

(1) The application for security for costs filed herein on 30 July 2014 is refused.

(2) The time limited for the respondent Continental Baking Company Limited to file and serve its written submissions in response to the appeal and in support of its counter-notice of appeal is hereby extended to 19 September 2014.

(2) The costs of this application shall abide the result of the appeal.